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# **Is European Union Law a Fully Self-Contained Regime? A Theoretical Inquiry of the Functional Legal Regimes in the Context of Fragmentation of International Law<sup>1</sup>**

**LIANA ANDREEA IONIȚĂ**

## **SETTING THE SCENE**

At a time when the European Union is remodelling its institutional and legal architecture, as well as its borders, and redefining its priorities, identity and role in the international arena, this article aims to analyze to what extent the EU legal order constitutes a separate field of law, evolving towards a special legal regime or even a self-contained regime.

An inquiry into the legal nature of the EU implies two perspectives of analysis, depending on the „level-of analysis problem”<sup>2</sup>: first of all, the analysis through the lens of international lawyers viewpoint and then, the analysis through the lens of EU lawyers perception. In the first case, if we look at the works of Dupuy<sup>3</sup>, Jan Klabbers<sup>4</sup> or Nollkaemper<sup>5</sup>, we notice that the supremacy of international law prevails over any kind of legal regime and EU is seen as an international organization. However, in the second case, while building their arguments on the *sui generis* nature of EU and its legal particularities, scholars

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<sup>1</sup> This paper is supported by the Sectoral Operational Programme Human Resources Development (SOP HRD), financed from the European Social Fund and by the Romanian Government under the contract number POSDRU/159/1.5/133675.

<sup>2</sup> J.D. Singer, “The Level- of- Analysis Problem in International Relations”, K. Knorr, S. Verba (eds.), *The International System: Theoretical Essays*, Princeton University Press, Princeton, 1961, p. 77.

<sup>3</sup> See, Pierre-Marie Dupuy, “Fragmentation du droit international ou des perceptions qu’on en a?”, *EUI Working Papers*, no. 14, 2006.

<sup>4</sup> See, Jan Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, Cambridge, 2009.

<sup>5</sup> See, Andre Nollkaemper, “Rethinking the Supremacy of International Law”, *Amsterdam Center for International Law Working Paper*, 2009.

and EU lawyers, like J.H.H. Weiler<sup>6</sup>, Piet Eeckhout<sup>7</sup>, Bruno de Witte<sup>8</sup>, Gráinne de Búrca<sup>9</sup> or K.S. Ziegler<sup>10</sup>, argue the increasing autonomy of this new EU legal order of international law.

Considering the outlines of these two intellectual debates, the article will answer to the following research question: Is European Union law a potential candidate for autonomous legal systems disconnected from general international law – the so-called self-contained regimes? *Pro et contra* arguments.

My contention is that, even though EU law is not totally decoupled from general principles of international law, the new legal order of the EU has taken a historical turn towards self-containedness. In order to demonstrate this hypothesis, I will first look at the characteristics of self-contained regimes in the light of the debate on the fragmentation of international law (Section I) and then I will engage in an attempt to build *pro et contra* arguments in order to explain the historical turn of EU legal regime towards self-containedness (Section II).

The methodological approach consists in providing a critical analysis, from an interdisciplinary point of view – political science, law and international relations –, of the Report on Fragmentation of International Law of the International Law Commission, concluded in 2006 and the ECJ case law in order to identify and explain *pro et contra* arguments, both in favour and against the following assertion: although EU law is not totally decoupled from general principles of international law, the new legal order of the EU has taken a historical turn towards self-containedness.

The corpus of empirical studies on the European legal system is nowadays remarkably extensive, specialized and largely sophisticated. Nevertheless, EU is still a fertile laboratory for the research. The main focus of this article is to investigate from an interdisciplinary stance – political science, international relations and law – a subject that is relatively new and innovative for the evolution of the EU legal scholarship. Aiming to explain the evolution of EU law towards a self-contained regime in international law, this article takes

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<sup>6</sup> See, J.H.H. Weiler, *The Constitution of Europe: “Do the New Clothes Have an Emperor?” and Other Essays on European Integration*, Cambridge University Press, Cambridge, 1999.

<sup>7</sup> See, P. Eeckhout, *EU External Relations Law*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2011; P. Eeckhout, A. Biondi, S. Ripley (eds.), *EU Law After Lisbon*, Oxford University Press, Oxford, 2012.

<sup>8</sup> See, Bruno de Witte, “Rules of Change in International Law: How Special is the European Community?”, *Netherlands Yearbook of International Law*, XXV, 1994, pp. 299-333.

<sup>9</sup> See, Paul Craig, Gráinne de Burca (eds.), *The Evolution of EU Law*, 2<sup>nd</sup> ed, Oxford University Press, Oxford, 2011.

<sup>10</sup> See, Katja S. Ziegler, “International Law and EU Law: Between Asymmetric Constitutionalisation and Fragmentation”, in A. Orakhelashvili (ed.), *Research Handbook on the Theory of International Law*, Edward Elgar Publishing, Cheltenham, 2011, pp. 268-327.

on the debate on the fragmentation of international law<sup>11</sup>, which represents the framework within which different features of modern law-making have been developed.

According to the United Nations International Law Commission (ILC) Report on “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (hereinafter the “ILC Report”), the background of fragmentation of international law has its roots in the globalization process, which has led to “the emergence of specialized and relatively autonomous spheres of social action and structure”<sup>12</sup>. All these transformations have caused legal effects and implications in the field of law, which, in order to respond to technical and functional needs and preferences of the actors, have led to the emergence of new types of specialized (quasi) autonomous law. Therefore,

“what once appeared to be governed by ‘general international law’ has become the field of operation for such specialist systems as ‘trade law’, ‘human rights law’, ‘environmental law’, ‘law of the sea’, ‘European law’ and even such exotic and highly specialized knowledges as ‘investment law’ or ‘international refugee law’ etc.- each posing their own principles and institutions”<sup>13</sup>.

This is the birth of the so-called “self-contained regimes” that are often referred to as the different specialized branches of international law, whose rate of evolution was directly proportional to the fragmentation phenomenon. Legal scholars have long time debated the question of “self-contained regimes” that are considered to be special legal regimes with its own norms and principles, which operate in an autonomous way vis-à-vis general international law. Even though “strong forms of *lex specialis*” that are more or less decoupled from the *lex generalis*, these self-contained regimes are not *in concreto* “closed legal circuits”. Therefore, we can observe that their relationship with the general international law is ubiquitous if we examine from the point of view of the general law of treaties (provided by the Vienna Convention of Law of Treaties of 1969) to which all these regimes have claimed its binding force<sup>14</sup>.

From the international law perspective and taking into account all mentioned above, one could not agree that EU law is a self-contained regime,

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<sup>11</sup> ILC Report, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law—Report of the Study Group of the International Law (Analytical Report) Commission*, finalized by Martti Koskenniemi [online], UN Doc. A/CN.4/L.682, 2006, available at <http://daccessdds.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement> (Accessed on 12 September 2013).

<sup>12</sup> *Ibidem*, p. 11.

<sup>13</sup> *Ibidem*.

<sup>14</sup> *Ibidem*, pp. 81-82.

bearing in mind that the application of general international law is not totally excluded from the EU law. However, from the EU law perspective, there are sufficient characteristics of the EU legal system that qualify it for this category of strong form of *lex specialis*. Although EU law is not totally decoupled from general international law because of its origins and operation as a regime constituted under the provisions of the general law of treaties, the case law of the Court of Justice of the European Union has firmly declared the “new legal order of international law”<sup>15</sup>. Regarding the relationship between EU law and international law, the former has developed its *domain réservé* regarding its independence and participation within the international order, as well as its own norms and rules of recognition, claiming its “own legal system”<sup>16</sup>, a subsystem of international law. Therefore, one could strongly argue that EU legal regime is likely to appear as self-contained.

## SELF-CONTAINED REGIMES IN THE LIGHT OF THE FRAGMENTATION OF INTERNATIONAL LAW

In this section, I will provide some conceptual preliminaries on the development of self-contained regimes in international law. I will first explore why the fragmentation of international law has encouraged the development of such legal regimes and then I will reflect on what they actually constitute by pointing out its historical usages and the current meanings according to contemporary legal scholars.

The United Nations International Law Commission (ILC) has reckoned with this issue in the context of the fragmentation of international law and before further explaining the emergence of the legal regimes, I will address the meaning of this phenomenon. The expanding scope of international law and its tendency to develop specialized techniques have turned into a ubiquitous presence in the international law scholarship throughout the years. The specialization of international law (in particular subject-areas such as human rights, trade, the environment and so on, that have become bodies of law), on one hand, and the expansion of international law (the proliferation of international judicial institutions, organizations, courts and tribunals), on the other hand, have substantially contributed to the fragmentation of international law. These were the major factors responsible for the fragmentation. The study

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<sup>15</sup> ECJ, Case 26/62, *NV Algemene Treansport- en Expenditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration*, 5 February 1963 (hereinafter “Case *Van Gend en Loos*”), p. 2.

<sup>16</sup> ECJ, Case 6/64, *Flaminio Costa v. ENEL*, 15 July 1964 (hereinafter “The *Costa v. ENEL* Case”), p. 593.

of such phenomenon raises fundamental question regarding the unity of international law, its substance and components: how can international law be broken apart if it was not a unitary body of law? But international law has never been a unified system and the lack itself of centralized organs (no centralized legislative body and institutions, no independent authority, no compulsory court system and no centralized enforcement) has made the fragmentation unavoidable.

The more expanded and specialized the international law becomes, the more it “is a victim of its own success”<sup>17</sup> and “a cultural and historical product”<sup>18</sup>, going through four main phases: the first three identified by David Kennedy – the Treaty of Westphalia, the League of Nations and the UN Charter<sup>19</sup> – to which Leathley adds the current phase of globalization<sup>20</sup>. As we observe “the globalization of international law”<sup>21</sup> and the redefinition of the international order within the context of the emergence of international non-state actors, a revolutionary wave resulted in the fall of the classical international law logic and the appearance of different “foyers de droits”<sup>22</sup>. These „foyers de droits” describe the different legal bodies around specific subject-areas that have been gravitating independently the international system and operating in their own regime of application and interpretation of the international norms and by their own rules and legal practices<sup>23</sup>. Their tendency is to claim their autonomy from the general principles of international law and become more or less self-contained or self-sufficient.

In 1999, the President of the International Court of Justice, Judge Stephen M. Schwabel, addressed to the United Nations General Assembly on the topic of the proliferation of international tribunals and expressed his concerns that “the proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations”<sup>24</sup>. In 2000 and 2001, Gilbert Guillaume (the following President of the International Court of Justice) has raised awareness in his speeches to the UN General Assembly regarding this “postmodern anxiety”<sup>25</sup> and pointed out that “judges

<sup>17</sup> C. Leathley, “An Institutional Hierarchy to Combat the Fragmentation Of International Law: Has the ILC Missed an Opportunity?”, *New York University Journal of International Law and Politics*, vol. 40, no. 1, 2007, p. 263.

<sup>18</sup> Emmanuelle Jouannet, *Le droit International*, PUF, Paris, 2013, p. 7.

<sup>19</sup> David Kennedy, “The Disciplines of International Law and Policy”, *Leiden Journal of International Law*, vol. 12, no. 1, 1999, pp. 83-101.

<sup>20</sup> C. Leathley, “An Institutional Hierarchy... cit.”, p. 264.

<sup>21</sup> Alain Pellet, “Vers une mondialisation du droit international?”, in *La Mondialisation au-delà des mythes*, S. Cordelier & al. (eds), La Découverte, Paris, 2000, pp. 93-100.

<sup>22</sup> J. Chevallier, *L'Etat postmoderne*, LGDJ, Paris, 2004, p. 4.

<sup>23</sup> Emmanuelle Jouannet, *Le droit International*, cit., pp. 56-69.

<sup>24</sup> Stephen M. Schwabel, *Address to the Plenary Session of the General Assembly of the UN*, 1999.

<sup>25</sup> Martti Koskenniemi, P. Leino, “Fragmentation of International Law? Postmodern Anxieties”, *Leiden Journal of International Law*, vol. 15, no. 3, 2002, pp. 553-579.

themselves must realize the danger of fragmentation in the law, and even conflicts of case-law, born of the proliferation of courts”<sup>26</sup>. This is the first time that the phenomenon of fragmentation is mentioned and officially recognized and ever since, it became the new research approach embraced by most legal scholars and international lawyers when defining the international legal order. The ILC established in 2002 a Study Group, which was chaired by Professor Martti Koskenniemi. This Study Group has conducted a research on this topic and issued in 2006 a final report on the “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” (the ILC Report). According to this Report, there are very important effects that have emerged naturally with this phenomenon: fragmentation has challenged the coherence of the international legal system and has led to conflicts between international norms and different interpretations. Therefore, the ILC Report addresses the topic from the point of view of the emergence of special law (*lex specialis*) as exception to the general law, by analyzing the conflicts between specialized norms of different legal regimes and general international law and between different types of special law<sup>27</sup>.

The most important problem that arises with the fragmentation of international law and creates incoherence is “the splitting up of the law into highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law”<sup>28</sup>. These are the so called “self-contained regimes” or “special regimes”.

Taking into consideration the technical and functional rationalities, new forms of *lex specialis* have developed more and more in different domains of law, such as trade law, human rights law, environmental law, EU law and so on, on one hand; on the other hand, we have faced the proliferation of specific international courts and tribunals that have embodied the political will of certain groups of States<sup>29</sup>, regionally or internationally established (for example the International Criminal Tribunal for the Former Yugoslavia, Court of Justice of the EU, European Court of Human Rights, International Centre for Settlement of Investment Disputes, International Arbitration Tribunal for the Law of the Sea).

In Koskenniemi’s Report, self-contained regimes are defined as strong forms of *lex specialis*<sup>30</sup> and “systems or subsystems of rules that cover some particular problem differently from the way it would be covered under general law”<sup>31</sup>. Their *raison d’être* is the specialization of the law in specific domains, following the preferences of their members, in order “to provide a more

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<sup>26</sup> Gilbert Guillaume, *Address to the Plenary Session of the General Assembly of the UN*, 2000.

<sup>27</sup> ILC Report, pp. 30-101.

<sup>28</sup> *Ibidem*, p. 13.

<sup>29</sup> C. Leathley, “An Institutional Hierarchy... cit.”, pp. 264-265.

<sup>30</sup> ILC Report, p. 80.

<sup>31</sup> *Ibidem*, p. 68.

effective protection for certain interests or to create a more context-sensitive regulation of a matter than what is offered under the general law”<sup>32</sup>.

Self-contained regimes are perceived like “sub-species of regimes”<sup>33</sup>, which from the point of view of Krasner’s regime theory, are “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations”<sup>34</sup>. If the self-contained regime is understood as a self-sufficient regime, “independent of external means or relations” and “complete in itself”<sup>35</sup>, this idea would imply that this kind of international regime would be totally isolated from general international law. Three observations are in place. Firstly, if in theory such regime could exist hermetically isolated from general law, however, in practice there is no sign of its existence *in concreto*. Secondly, from an international law perspective, there is no regime that could be labelled as “self-contained” because it has not formed “a closed legal circuit”<sup>36</sup>. Even though in its sphere of application prevails its own rules (*lex specialis*), these should be interpreted as exceptions from the general law and therefore, in a limited way. Thirdly, as ILC has already concluded, every self-contained or special regime links up to general international law, at least regarding the two following aspects:

“First, it [general international law] provides the normative background that comes in to fulfill aspects of its [self-contained regime’s] operations not specifically provided by it. [...] Second, the rules of general law also come to operate if the special regime fails to function properly. [...] Also the rules of State responsibility might be relevant in such situations”<sup>37</sup>.

All in all, these legal regimes are not hermetically isolated from general international law because their creation, conditions of validity and operation, as well as the rules on State responsibility are still determined by principles of general law. Therefore, taking into consideration all above, the ILC Report mentioned that “self-contained regimes” could be misleading and even suggested that the term of “special regime” could better characterize the current situation.

The conceptualization of the term of “self-contained regimes” in the legal discourse was coined by two very important judgments of the International Court of Justice<sup>38</sup>. The term of self-contained regimes entered the

<sup>32</sup> *Ibidem*, p. 97.

<sup>33</sup> Math Noortmann, *Enforcing International Law: From Self-help to Self-contained Regimes*, Ashgate Publishing Limited, Aldershot, 2005, p. 131.

<sup>34</sup> S.D. Krasner (ed.), *International Regimes*, Cornell University Press, Ithaca, 1983, p. 2.

<sup>35</sup> Cf. Online Oxford English Dictionary.

<sup>36</sup> ILC Report, p. 82.

<sup>37</sup> *Ibidem*, p. 100.

<sup>38</sup> See, PCIJ, Case A-1, S.S. “Wimbledon” *Brittany, France, Italy and Japan c. Germany*, 28 June 1923 (hereinafter “The S.S. Wimbledon Case”); ICJ, *Case Concerning United States*



international legal vocabulary first as a concept fixing a problem of treaty interpretation with regard to the relation between primary international obligations, claiming that “the provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained”<sup>39</sup>. Those provisions were complete in themselves and since there were specific norms (forming a special legal regime) in Article 380 of the Treaty of Peace of Versailles with regard to the Kiel Canal, the other general applicable articles were not to be used or provide any help in the interpretation of those particular norms. Moreover, in the early 1980s, the term was used in the case of secondary norms by the International Court of Justice, which stated through its decision in the *Tehran Hostages* Case that legal norms of diplomatic law established by the Vienna Convention on Diplomatic Relations are to be applied independently from the international general law of state responsibility:

“The rules of diplomatic law, constitute a self contained regime which, on the one hand, lays down the receiving state’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious”<sup>40</sup>.

International scholars of international law have associated ever since an increasing level of autonomy to the self-contained regimes. Treaties or set of treaties (forming a specific treaty regime) started to be seen in international law as legal (quasi) autonomous sub-systems which developed their own rules and norms and excluded more or less the application of general international law. Based on the International Court of Justice’ ruling in the 1980s, the definition provided by Bruno Simma and Dirk Pulkowski to the concept of self-contained regime does not refer to any legal subsystem of international law, but it is applied to “particular category of subsystems, namely those that embrace a full, exhaustive and definitive, set of secondary rules”<sup>41</sup>. Moreover, Simma and Pulkowski agree with the observations of the Report on their *modus operandi* as forms of “strong *lex specialis*”, whose main particularity is their tendency to “exclude the application of the general international law on state responsibility, in particular resort to countermeasures by an injured state”<sup>42</sup>.

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*Diplomatic and Consular Staff In Tehran United States of America v. Iran*, 24 May 1980 (hereinafter “The *Tehran Hostages* Case”).

<sup>39</sup> The S.S. “*Wimbledon*” Case, pp. 8-9.

<sup>40</sup> The *Tehran Hostages* Case, p. 86.

<sup>41</sup> Bruno Simma, Dirk Pulkowski, “Of Planets and the Universe: Self-contained Regimes in International Law”, *European Journal of International Law*, vol. 17, no. 3, 2006, p. 493.

<sup>42</sup> *Ibidem*, p. 495.

According to the ILC Report on Fragmentation of International Law, there are various regimes that are often qualified as self-contained: human rights law, WTO law, European/EU law, humanitarian law, diplomatic law, spatial law and so on<sup>43</sup>.

## IS EUROPEAN UNION LAW A FULLY SELF-CONTAINED REGIME?

The EU law as a self-contained regime is a topic to which scholars haven't given greater attention in the context of fragmentation of international law. However, the EU *sui generis* legal system is constantly evolving and facing an increasing degree of autonomy from the general international law and in this context, a discussion regarding its self-containedness needs to be placed at the core of EU law scholarship. This issue is studied from two perspectives. By analogy to Singer's theory of "the level-of-analysis" applied to the international relations field, we identify *pro* and *contra* arguments depending either on the level of public international lawyers and second, or on the level of scholars in EU law. Therefore, I agree with the observations of the ILC's Special Rapporteur Arangio-Ruiz:

"Generally, the specialists in Community law tended to consider that the system constituted a self-contained regime, whereas scholars of public international law showed a tendency to argue that the treaties establishing the Community did not really differ from other treaties."<sup>44</sup>

In Section II, I will first identify the most important arguments both supporting and denying the self-contained regime of the EU law and then, taking all these into account, I will eventually state and explain my position on the topic.

### *Arguments Against EU Law as A Self-Contained Regime*

Among the *contra* arguments, the first thing to be considered is the EU's foundation in the sphere of international law. Therefore, in international law, EU is considered an international organization and has been established under provisions of international law, namely the Vienna Convention on the

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<sup>43</sup> ILC Report, p. 68.

<sup>44</sup> G. Arangio-Ruiz, "Summary Records of the Meetings of the Forty-fourth Session", *ILC Yearbook*, vol. I, 1992, p. 76.

Law of Treaties on 1969. Thus, EU as a subject of international law has recognized the binding force of the general law of treaties.

The second reason takes into account the omnipresence of general law. Even though the fragmentation of international law has influenced the emergence of different special regimes, the ILC Report stated that “no regime is self-contained”<sup>45</sup>. If we perceive the set of rules established by self-contained regimes as hermetically isolated from the general law, we would be inclined to affirm that EU law is not a closed legal circuit.

The third argument derives from the previous one and is based on the fact that, according to the ILC Report, “every special regime links up with general international law”<sup>46</sup>, especially regarding the conditions of validity of its establishment by the founding treaties. Firstly, the EU legal order cannot exist beyond the sphere of international law; the conditions of its operation, its international legal personality and its capacity to act globally derive from general law. Concurring Pellet, Simma and Pulkowski state that from the international law point of view, the EU law is to be considered as a subsystem as long as its operations are not independent from the consent of the states themselves, so that any significant evolution regarding the EU legal system needs the prior approval of EU members<sup>47</sup>. Moreover, there are cases when the general international law prohibits deviations and that would be the case of rules having the character of *jus cogens* or even other types of general international norms, like some human rights treaties, that do not permit derogation by way of *lex specialis*. However, the derogation remains eventually a question of interpretation of the general law<sup>48</sup>.

The fourth argument denying the full self-contained character of the EU legal system regards the question of international responsibility of the EU Member States. According to the Report, the linkage between the EU regime and the general international law is notable in cases of possible fall-back to the general international law of the state responsibility due to the regime’s failure: “Once a self-contained regime fails, recourse to general law must be allowed”<sup>49</sup>. Consequently, Simma and Pulkowski have identified two hypothetical scenarios in which “the mechanisms under the EC [European Community] Treaty fail to give effects to the obligations members have assumed under the Treaty”<sup>50</sup>, which would provoke a fallback to the international rules of state responsibility. First of all, there is the situation regarding the continuous breaches of EU law by a Member State despite the Commission’s recommendations and finally the

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<sup>45</sup> ILC Report, p. 100.

<sup>46</sup> *Ibidem*, p. 101.

<sup>47</sup> Bruno Simma, Dirk Pulkowski, “Of Planets and the Universe...cit.”, p. 516.

<sup>48</sup> ILC Report, p. 60.

<sup>49</sup> *Ibidem*, p. 82.

<sup>50</sup> Bruno Simma, Dirk Pulkowski, “Of Planets and the Universe...cit.”, pp. 516-517.

judgment of the Court, when “the only option to induce compliance that remains for the injured state is a fallback on unilateral countermeasures”<sup>51</sup>. The second scenario regards the state-to-state reparation in case of violation of EU law. Simma and Pulkowski highlight the fact that Member States are entitled to fall back on general rules, including resort to countermeasures in their claim, in the event that the European legal system doesn’t provide an “explicit provision for a mechanism that would allow inter-state claims of reparations” or the existing procedures doesn’t prove efficacious; the authors go beyond this explanation and, revisiting the case law of the ECJ – benefiting from its appointed role as the guardian of the law –, propose a solution to be taken into consideration: “Recourse to the rules on state responsibility will not be necessary if the European Court of Justice accepts [...] to accommodate inter-state claims for damages within European legal system”<sup>52</sup>.

Taking into consideration the arguments stated above, there are legal scholars<sup>53</sup> that claim that EU legal system is not conceptually a fully self-contained regime, since the resort to general rules and principles of international law, like the state responsibility, is not entirely excluded.

### *Approaches Favoring EU Law as A Self-Contained Regime*

It is essential to firstly point out the *sui generis* character of the EU law in general international law, which would make it plausible to reiterate the European exceptionalism and the unique capacity of the EU to display important legal features into the international field<sup>54</sup>. I have presented above reasons sustaining the fact that the international law is an integral part of the EU legal order; however, there are limits that prove the complexity of this relationship and from the legal perspective of the EU scholars, the issue of the EU law as a self-contained regime is an essential feature characterizing the relationship between the special set of rules of the EU legal order and the general international law. The *sui generis* character of the EU law generates

“The extent to which the EC is a self-contained regime, that is, a distinct system or subsystem of international law whose secondary rules (the rules of change or the rules governing the implementation, operation and amendment of the Treaties) are determined by the regime itself, that is, are special to the

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<sup>51</sup> *Ibidem*, 517.

<sup>52</sup> *Ibidem*, p. 518.

<sup>53</sup> See, Bruno Simma, Dirk Pulkowski, “Of Planets and the Universe...cit.”; G. Conway, “Breaches of EC Law and the International Responsibility of Member States”, *European Journal of International Law*, vol. 13, no. 3, 2002, pp. 679-695.

<sup>54</sup> G. Nolte, H.P. Aust, “European Exceptionalism”, *Global Constitutionalism*, vol. 2, no. 3, 2013, pp. 407-436.

regime itself and are not simply the application of conventional secondary rules of general public international law”<sup>55</sup>.

The second argument is the evolution of EU legal system in terms of autonomy which has passed through various stages in time. Over the centuries, the European construction faced a unique phenomenon and according to J.H.H. Weiler, one of the leading scholars of European law, the EU has advanced in the context of “the breach and alienation from international law and its transformation into a constitutional legal order”<sup>56</sup>. It has been concluded that the EU legal system has evolved from its international *status nascendi* of a typical treaty-based system (an international organization) into a European regime, which from the point of view of the legal architecture, its own enforcement and sanctioning powers, special institutional design embodying the legislative, executive and judiciary powers, its multi-level network governance and quasi-federal particularities, is the very picture of nation states.

The establishment of this self-contained regime took place in the context of a set of founding treaties and treaties modifying its legal and institutional design in order to face the complex economic, politic and legal integration process. It was in 1963 that the European Court of Justice (ECJ) declared that the EU (the European Economic Community at that time) was a “new legal order of international law”<sup>57</sup>. According to Morten Rasmussen, “the key step towards establishing what the court would term ‘a new legal order of international law’ in the judgment had already been made by the member states when they ratified the Treaties of Rome, due to the treaties’ special legal and institutional nature”<sup>58</sup>. This momentum is the historical turn of the EU law towards self-containedness because the Court’s judgment in the *Van Gend en Loos* Case has advanced the constitutional direction of the evolution of the EU legal order, “revolutionizing European law”, as Rasmussen has described it<sup>59</sup>.

The case law of the ECJ has had a valuable contribution to the development of the EU law into such a legal regime. The Court’s reasoning in the *Costa v. ENEL* Case has advanced the *sui generis* character of EU legal system in relationship to the general international system:

“By contrast with ordinary international treaties, the EEC [European Economic Community] treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. [...] creating a

<sup>55</sup> G. Conway, “Breaches of EC Law...cit.”, p. 680.

<sup>56</sup> J.H.H. Weiler, *The Constitution of Europe...cit.*, p. 293.

<sup>57</sup> The *Van Gend en Loos* Case.

<sup>58</sup> Morten Rasmussen, “Revolutionizing European Law: A History of the *Van Gend en Loos* Judgment”, *International Journal of Constitutional Law*, vol. 12, no. 1, 2014, p. 139.

<sup>59</sup> *Ibidem*.

community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane”<sup>60</sup>.

The third important argument is touching upon the normative basis of the EU legal regime, which makes it self-contained – the *acquis communautaire* of the EU. The experts in EU law, like C. Delcourt and L. Azoulai<sup>61</sup>, have argued that this concept is rather characterized by ambiguity due to the dynamic character of the EU legal order and its never-ending evolution. The development of the *acquis communautaire*, which if the corpus of EU law (including treaties, legislation, international agreements, judgments of the ECJ, fundamental rights provisions) from 1958 to date is a significant proof of the fact that the EU self-contained regime has established its own principles, norms and rules in its sphere of application. Therefore, EU law has advanced its own reserved domain and rules of recognition and has built its own “principles of direct effect, supremacy and the doctrine of fundamental rights”, which have “taken place through the interpretative activity of the ECJ and not always with the full support of all Member States”<sup>62</sup>.

The fourth argument refers to the special relationship of the EU legal order vis-à-vis general international law in the light of the doctrine of exclusive state responsibility. By analogy to the ILC Report’s observations on self-contained regime, we can agree that the EU regime is a special case of *lex specialis* (that is, like a sort of exception to the general rule), which “take better account of the particularities of the subject-matter to which they relate; [...] regulate it more effectively than the general law and follow closely the preferences of their members”<sup>63</sup>. Therefore, certain international rights and obligations are not applied to the EU law or are applied in a limited way. According to Professor J.H.H. Weiler, the particularities of the EU self-contained regime draw on the fact that special regime’s procedures and rules prevail against the general law, even regarding the state responsibility in international law, along with the principles of reciprocity and countermeasures, in case of infringement of international obligations:

“The Community legal order is a truly self-contained legal regime with no recourse to the mechanism of state responsibility, at least as traditionally understood, and therefore to reciprocity and countermeasures, even in the case

<sup>60</sup> The *Costa v. ENEL* Case, p. 593.

<sup>61</sup> See, C. Delcourt, “The Acquis Communautaire: Has the Concept Had Its Day?”, *Common Market Law Review*, vol. 38, no. 4, 2001, pp. 829-870; L. Auzolai, “The Acquis of the European Union and International Organisations”, *European Law Journal*, vol. 11, no. 2, 2005, pp. 196-231.

<sup>62</sup> ILC Report, p. 84.

<sup>63</sup> *Ibidem*, p. 99.

of actual or potential failure. Without these features, so centric to the classic international legal order, the Community truly becomes something ‘new’<sup>64</sup>.

By contrast to the hypothesis developed by Simma and Pulkowski and presented here above, regarding the ultimate recourse to the general public law and to the classical principal of state responsibility in case of various lacunae in EU law, there are a few important aspects to be considered in order to sustain the EU legal regime as self contained. First of all, the Treaty of Lisbon has developed different mechanisms and alternative methods of dispute settlement<sup>65</sup>, which involve a reasoned opinion from the Commission, with which Member States concerned should comply; otherwise, the matter may be brought before the ECJ for an alleged infringement of obligations under the treaties, or even more, for non-compliance with the Court’s decisions, which in this case will lead to penalty payment, as it is stipulated in the TEU post-Lisbon:

“Article 258

If the Commission considers that a Member State has failed to fulfill an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 260

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfill an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures [...], it may bring the case before the Court [...]. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.”<sup>66</sup>

Moreover, the case law of the ECJ has established through a series of decisions the rejection of the use of important principles of general law, like state responsibility, countermeasures and reciprocity mechanisms, on the basis of the fact that the EU treaties provide all the appropriate remedies in situations where Member States haven’t fulfilled their obligations stipulated under the treaties. Here are some relevant judgments:

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<sup>64</sup> J.H.H. Weiler, *The Constitution of Europe...cit.*, p. 29.

<sup>65</sup> See, Art. 5.2 (g) TEU.

<sup>66</sup> See, Art. 258, 260 TEU.

“[...] it must be pointed out that in no circumstances may the member states rely on similar infringements by other member states in order to escape their own obligations under the provisions of the treaty.”<sup>67</sup>

“In fact the Treaty is not limited to creating reciprocal obligations between the different natural and legal persons to whom it is applicable, but establishes a new legal order which governs the powers, rights and obligations of the said persons, as well as the necessary procedures for taking cognizance of and penalizing any breach of it. [...] Therefore the fact that the Council failed to carry out its obligations cannot relieve the defendants from carrying out theirs.”<sup>68</sup>

“[...] a Member State may not rely on the fact that other Member States have also failed to perform their obligations in order to justify its own failure to fulfill its obligations under the Treaty [...]. In the legal order established by the Treaty, the implementation of Community law by the Member States cannot be made subject to a condition of reciprocity.”<sup>69</sup>

All these decisions mentioned above explain how the EU has gradually reached greater autonomy from the international law due to the case law of the ECJ, which proved to be the driving force behind the constituency of the EU's self-contained regime.

This line of reasoning takes the current analysis to another important argument supporting the thesis statement: the Court's judgments have contributed to the development of the current special mechanisms and techniques of the EU legal system, acting “as a gatekeeper by regulating the relationship between international law and Community law”<sup>70</sup>.

In this regard, it is relevant for the present study to take a closer look at the *Kadi* Case, whose judgment – one of the most controversial and extensively debated in the public sphere – “has been associated with a dualist conception of the interplay between the international and the Union legal order”<sup>71</sup>. The subject of the *Kadi* Case is referring to the implementation by the EU of UN Security Council resolution regarding the sanctions (an assets freeze) imposed to a possible supporter of Al-Qaida, who was accused of terrorist acts. Therefore, it has been questioned the primacy of UN law over EU law and possible conflicts that might arise on the basis of the relationship between obligations under

<sup>67</sup> ECJ, Joined cases 142 and 143/80, *Amministrazione delle Finanze dello Stato v Essevi Spa and Carlo Salengo*, 27 May 1981.

<sup>68</sup> ECJ, Joined cases 90/63 and 91/63 *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium*, 13 November 1964.

<sup>69</sup> ECJ, Case C-38/89 *Ministère public v Guy Blanguernon*, 11 January 1990.

<sup>70</sup> Nikos Lavranos, “Protecting European Law from International Law”, *European Foreign Affairs Review*, vol. 15, no. 1, 2010, pp. 281-282.

<sup>71</sup> Juliane Kokott, Christoph Sobotta, “The *Kadi* Case – Constitutional Core Values and International Law – Finding the Balance?”, *The European Journal of International Law*, vol. 23, no. 4, 2012, pp. 1017.



Charter of the United Nations and obligations deriving from the EU treaties with which EU Member States have to comply<sup>72</sup>.

Taking into account the reasoning of the Court, first, in September 2005, before the Court of First Instance (CFI)<sup>73</sup>, which is a constituent court of the ECJ, and second, in September 2008, before the ECJ itself, the substantial difference between the two separate judgments has determined EU lawyers to argue that the dualist approach could be explained in correlation with the strengthening of the autonomy of EU law<sup>74</sup>. Gráinne de Búrca has identified, on one hand, the “strong constitutionalist approach” of the first ruling of the CFI, which was based “on the systemic unity of the international legal order and the EU order, and on a hierarchy of legal authority within this integrated system”, and on the other hand, the “strong pluralist approach” of the final ruling of the ECJ, which “presented the European Union as a separate and self-contained system which determines its relationship to the international order in accordance with its own internal values and priorities rather than in accordance with any mutually negotiated principles or norms”<sup>75</sup>.

Yassin Abdullah Kadi, a Saudi Arabian national, was included in 2001 on a list published by the Sanctions Committee of the United Nations Security Council, among other entities and persons who were associated with Osama bin Laden, Al-Qaeda or the Taliban and whose assets were supposed to be frozen. Kadi has filed a petition to the CFI, in 2001, demanding the annulment of the Regulation 881/2002, adopted by the European Commission in order to implement a series of UNSCR Resolutions related to the freezing of funds, because this Regulation has violated his right to property and to a fair hearing. The first ruling delivered by the CFI<sup>76</sup> in 2005 has rejected Kadi’s petition, on the grounds of the stipulations of the Charter of the United Nations and mainly of the Article 103, claiming the prevalence of the members’ obligations under the Charter of the United Nations, to the detriment of any other obligation under an international treaty and convention<sup>77</sup>. Moreover, in cases related to

<sup>72</sup> Brunno Simma, “Universality of International Law from the Perspective of a Practitioner”, *The European Journal of International Law*, vol. 20, no. 2, 2009, p. 292. See also, *The Kadi and Al Barakaat Cases*; N. Walker, J. Shaw, S. Tierney, *Europe’s Constitutional Mosaic*, Hart Publishing, Oxford, 2011.

<sup>73</sup> After the entry into force of the Lisbon Treaty in 2009, the Court of First Instance is known as the General Court.

<sup>74</sup> Gráinne de Búrca, “The European Court of Justice and the International Legal Order After Kadi”, *Harvard International Law Journal*, vol. 51, no. 1, 2010, p. 23.

<sup>75</sup> *Idem*, “The ECJ and the international legal order”, in Gráinne de Búrca, J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge University Press, Cambridge, 2012, pp.136-137.

<sup>76</sup> CFI, Case T-315/01 P *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, 21 September 2005 (hereinafter “The Kadi Case”).

<sup>77</sup> See, Art. 103 *Charter of the United Nations*.

international peace and security, members of the UN invest the Security Council with the power to act on their behalf:

“Article 24

1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.”<sup>78</sup>

The Charter of the United Nations claims that all the members of the UN are bound by the decisions of the Security Council, that they are required to respect and implement, directly or through other forms of action:

“Article 25

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>79</sup>

“Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.”<sup>80</sup>

These main arguments invoked by the CFI have revealed the pre-eminence of the decisions of the Security Council over the Community law and have characterised the relationship between the international legal order under the UN law and the Community legal order under the EU law in the following terms:

“From the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations clearly prevail over every other obligation of domestic law or of international treaty law including, for those of them that are members of the Council of Europe, their obligations under the ECHR and, for those that are also members of the Community, their obligations under the EC Treaty.”<sup>81</sup>

In its ruling, CFI has expressed that this “primacy extends to decisions contained in a resolution of the Security Council”<sup>82</sup> and that “Member States may, and indeed must, leave unapplied any provision of Community law,

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<sup>78</sup> See, Art. 24.1 *Charter of the United Nations*.

<sup>79</sup> See, Art. 25 *Charter of the United Nations*.

<sup>80</sup> See, Art. 48 *Charter of the United Nations*.

<sup>81</sup> See, *The Kadi Case*, para. 181.

<sup>82</sup> *Ibidem*, para. 184.

whether a provision of primary law or a general principle of that law, that raises any impediment to the proper performance of their obligations under the Charter of the United Nations”<sup>83</sup>.

If the first ruling of the CFI has stated that EU law was bound by UN law, the final ruling of the ECJ in September 2008 has concluded that “the relationship between international law and the Community legal order is governed by the Community legal order itself, and international law can permeate that legal order only under the conditions set by the constitutional principles of the Community”<sup>84</sup>. It emphasized the autonomy of the EU legal order and the need to address in this context the conflict that might arise between international law and special regimes of law, as it is the present EU law.

The provisions stipulated in Article 103 of the Charter of the United Nations, which states that the principle of the primacy of obligations under UN law prevail over any other obligations of the Member States:

“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”<sup>85</sup>.

However, the ECJ has reasoned that the Article 351 TFEU is applied, determining the relationship between international law and EU law:

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties”<sup>86</sup>.

Therefore, international obligations undertaken by EU’s Member States before their EU membership cannot have effect on the obligations arising from the EU treaties. Interpreting these provisions, ECJ stressed the autonomy of the EU legal system:

“The question of the Court’s jurisdiction arises in the context of the internal and autonomous legal order of the Community, within whose ambit the contested regulation falls and in which the Court has jurisdiction to review the validity of Community measures in the light of fundamental rights”<sup>87</sup>.

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<sup>83</sup> *Ibidem*, para. 190.

<sup>84</sup> ECJ, Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 3 September 2008 (hereinafter “The Kadi and Al Barakaat Cases”), p. 24.

<sup>85</sup> See, Art. 103 *Charter of the United Nations*.

<sup>86</sup> See, Art. 351 TFEU.

<sup>87</sup> The Kadi and Al Barakaat Cases, p. 317.

Moreover, the ECJ explained in its reasoning that the constitutional principles of the EU treaties are not to be violated by any obligations deriving from international agreements. Therefore, if conflicts may arise, the Court cannot “permit any challenge to the principles that form part of the very foundations of the Community legal order”, namely the fundamental rights and freedoms, and is empowered to determine the effect of the international obligations in the domestic order of the EU: „it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty”<sup>88</sup>.

Furthermore, the approach of the ECJ vis-à-vis general international law provided in its *Kadi* judgment enables us to come to the heart of the constitutionalisation of the EU law. “After *Kadi*, it has become increasingly common among EU lawyers to conceptualise autonomy in a strong constitutional sense”<sup>89</sup>. Declaring the primacy of EU law, not only over the domestic constitutions of the member states, but also over the international order established by the Charter of the United Nations, the *Kadi* judgment has advanced a redefinition of the relationship between EU law and international law. Reconsidering the position of the new legal order of the EU within the international legal order, different legal perspectives have been developed in the light of conceptualization the autonomy of the EU law. Lavranos emphasizes that this special autonomy is one of the “elements that make up the very foundation of the Community legal order”, reflecting “the essentials of European constitutional law”<sup>90</sup>. Moreover, Henri de Waele has interpreted the ECJ decisions in the terms of change of hierarchy, stating that EU law is hierarchically superior to international legal provisions, which has “put the independent character of the Community legal system beyond doubt, and underscored the unprecedented nature of European law once and for all”<sup>91</sup>. Considering the fact that the EU legal system operates in different important fields, like trade security and defence<sup>92</sup>, without the application of certain principles of public international law, namely the countermeasures and reciprocity mechanisms, I recognize its self-contained character, even though it

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<sup>88</sup> *Ibidem*, p. 5.

<sup>89</sup> Jan Willem van Rossem, “The Autonomy of EU Law: More is Less?”, in R.A.Wessel, S. Blockmans (eds.), *Between Autonomy and Dependence*, T.M.C. Asser Press, The Hague, 2013, p. 14.

<sup>90</sup> Nikos Lavranos, “Protecting European Law...cit.”, p. 271.

<sup>91</sup> Henri de Waele, “The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment”, *Hanse Law Review*, 2010, vol. 6, no. 1, pp. 8-9.

<sup>92</sup> William Phelan, *In Place of Inter-State Retaliation: The European Union's Rejection of WTO-style Trade Sanctions and Trade Remedies*, Oxford University Press, Oxford, 2014, p. 21.

might be conceptually debatable by different scholars, as a relevant feature for the evolution of the European constitutionalism.

## CONCLUSION

Therefore, it is clear that there are both arguments against and favoring EU law as a self-contained regime, depending on the level of analysis of the international law scholars and respectively, EU law scholars. This inquiry is based on the empirical analysis of the relation between the general international law and the self-contained regimes, and particularly the EU legal regime, in the light of the fragmentation of international law – phenomenon which has led to the emergence of these specialized and (quasi) autonomous bodies of law. The construction and analysis of the *pro et contra* arguments are grounded on the critical analysis, from an interdisciplinary perspective, of the ILC Report on Fragmentation of International Law, concluded in 2006 and the ECJ case law. Analyzing both arguments in favor and against the self-contained character of the EU legal regime, this research confirms the initial hypothesis that, albeit the omnipresence of international law and the special relationship between EU law and general international law, the EU legal order has taken a historical turn towards self-containedness.

On the one hand, the reasons why the self-contained character of the EU regime is extensively debated and conceptually denied refer to the following aspects: (1) the EU's foundation in international law as a international organization and subsystem of international law; (2) the omnipresence of general law admitted by the majority of legal scholars and the inexistence *in concreto* of the fully self-contained regimes; (3) the existing linkage between the legal regimes in general and EU regime in particular and general international law, in terms of validity of the establishment of the legal regimes; and (4) the complex problem of the fallback on public international law state responsibility and countermeasures mechanisms in case the mechanisms inherent in the EU legal order fail.

On the other hand, the EU legal regime is characterized by a set of accurate features sufficient to justify the historical turn towards self-containedness: (1) the *sui generis* character and modus operandi of the EU legal order and its peculiar characteristics that differentiate it from any other regime of international law; (2) the constant evolution of the EU system in terms of autonomy, from the typical treaty- based regime of international law into a *sui generis* regime and a new legal order of international law (different from the traditional general order); (3) the consolidation of the *acquis communautaire*, which is the proof of the never-ending evolution of the EU law, independently of the general rules, and the establishment of its own constitutional legal order,

accommodating fundamental inherent principles, norms, procedures and mechanisms within its sphere of operation; and (4) the rejection of the use of general principles of public international law, namely state responsibility, countermeasures and reciprocity mechanisms, in case of breaches of law, and the role of the ECJ as the engine of the evolution towards self-containedness of the EU law, under the aegis of conclusive judgments.

Having stated the *pro et contra* arguments articulated in this article, conclusions can be provided to the research question posed at the outset of this inquiry. Therefore, the EU law represents a potential candidate for self-contained regime. I agree that the EU legal system is not a closed legal circuit because it connects with the general law in special circumstances stated above and clearly detailed in the Report of the fragmentation of international law. Thus, one can observe the effects of the public international law in the domestic sphere of the EU law and for these reasons, one admits the fact that it is not fully isolated regime. However, according to the arguments presented above, I notice that the EU has taken a historical turn towards self-containedness, progressively building its own autonomy vis-à-vis general law and revolutionizing EU law.